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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 2, Original.

IN EQUITY.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

SUPPLEMENTAL BRIEF FOR WEST VIRGINIA UPON THE SUBJECT OF INTEREST.

A. A. LILLY,
Attorney General;
CHAS. E. HOGG,
JOHN H. HOLT,
Associate Counsel for West Virginia.

April 26, 1915.

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Section VIII of article VIII of the Constitution of West Virginia constitutes the contract between the two States, and it is simply a promise made by the representatives of the people of West Virginia in constitutional convention assembled unto the State of Virginia to assume an equitable proportion of the public debt of Virginia existing prior to January 1, 1861. How broad is this promise and how far-reaching? Does it simply mean the assumption upon the part of West Virginia of an equitable proportion of the principal of that debt, or does it carry inherently with it or by implication the assumption or payment of an equitable pro-

portion of the interest accruing on that debt as well as an equitable proportion of its principal?

A debt, as defined by the law writers, is a specific sum that is due, and, applying this definition to the contract in hand, the debt to the payment of which West Virginia promised to contribute could have meant nothing more than the principal as it existed prior to the first day of January, 1861, and no unearned interest thereon. Unearned interest was not contemplated, and there was no promise to pay anything arising or accruing either in the shape of principal or interest after the first day of January, 1861. The real meaning of the contract is, and such was the intention of West Virginia, that out of the principal of the then existing debt, whatever its total amount at that time may have been, an equitable proportion was to be carved and set aside as the principal of a new debt created against West Virginia and in favor of Virginia. The old debt owing by the State of Virginia to her bondholders would go right along undiminished and unaffected by the agreement between the two States. West Virginia made no promise to these bondholders, and by the new contract the obligation of Virginia to her bondholders was not diminished, but remained the same. The principal of her debt to them remained the same and it bore interest just as it did before and both were to be paid by her to them. The fact that West Virginia might pay Virginia certain moneys would not affect the situation, for Virginia, after she had received these moneys from West Virginia, was under no obligation to apply them to the discharge of her debt to the bondholders. She was at perfect liberty to spend any money she received for any other purpose that she might please, or she might use it for the discharge of a portion of her bonded debt. There was nothing imperative upon her in this connection. The contract was and is silent upon this subject, and its terms do not make any moneys to be paid thereunder a trust fund in the hands of Virginia to be applied to the discharge and settlement of

her bonds. West Virginia made no promise to Virginia's bondholders. She does not know them and can have nothing to do with them.

The new debt thus created and existing between the two Virginias might bear interest, it is true, but it would be by virtue of the fact that the contract between the two States so provided. It would not be by virtue of the fact that the old bonded debt of Virginia, existing prior to January 1, 1861, bore interest.

If the promise of West Virginia to Virginia, by way of illustration, had been to pay not an indefinite equitable proportion of the public debt of Virginia as it existed prior to January 1, 1861, but had been a promise to pay a definite and ascertained part thereof, such as one-third, one-fourth, or one-fifth, the only thing necessary to be done would have been to ascertain the full amount of the net debt and then take one-third, one-fourth, or one-fifth thereof, whatever the case might be, as the measure of the obligation resting upon West Virginia to the State of Virginia, and as soon as this amount had been determined West Virginia might have at once ended all her obligations to Virginia by paying her in cash the amount so fixed and ascertained. If she had had current moneys on hand sufficient for the purpose and had paid them over to Virginia, her entire obligation would have been settled and at an end. No question of interest would arise between the two States at all. Virginia would have been compelled to receive the money thus tendered for the reason that the contract between them does not say when it was to be paid, whether it was to be upon time or in cash, and Virginia could not have refused to receive the sum so ascertained and the question of interest would have been eliminated forever without any interest ever having run. Or, upon the other hand, if West Virginia had had no current funds with which to settle the principal thus ascertained, she might have issued her bonds, payable to Virginia, to bearer, or to the order of Virginia for the amount of the

principal and bearing on their face such rate of interest as might be agreed upon between the two States, not necessarily the same rate that was borne by the old Virginia bonds. Or West Virginia might have issued her bonds and sold them to her own citizens and raised the money wherewith to discharge her debt to Virginia; and she might have been able to negotiate bonds in this way at two or three per cent interest, at least for a much less rate of interest than is borne by the Virginia bonds, and after they had been so negotiated she could pay the lesser rate to the holders of her bonds and no interest would accrue or be paid to Virginia.

It may be said, however, that all this will be granted; that no question will be made of these propositions or either of them, but that West Virginia did not do this; that she did not ascertain and discharge the principal in the way suggested and thereby prevent the running of interest. The answer to this suggestion, however, is that West Virginia did not do it because she could not. There never was a time when she, standing alone, could have ascertained her equitable proportion of the Virginia debt, and had she had the money to pay it, she could not have accomplished it for the reason that she did not know how much it was. It was not one-third, or one-half, or one-fifth of the Virginia bonds, but it was an "equitable" proportion thereof, which means nothing until after the equities have been examined and the amount made definite.

There are but two ways in which this indefinite sum could ever have been fixed; first, either by the agreement of the parties; or, second, by an application to this court. West Virginia could not have applied to this court because a debtor cannot sue the creditor. The man who owes cannot sue the man he owes, but the other must institute the proceeding against him. Virginia was the claimant and West Virginia had no claim against Virginia to enforce. And when we turn to the other method of ascertainment, namely, by agreement of the parties, we find that West Virginia was equally

helpless. From January 1, 1861, to June 20, 1863, she was not a State and could not negotiate. From June 20, 1863, to April 2, 1866, a state of war existed and negotiations would have been treasonable. From 1866 to 1871 a suit was pending in this court between the two States, by which the integrity of the territory of West Virginia was attacked by the State of Virginia, and until the settlement of that controversy West Virginia could not negotiate. This suit pended until the year 1871 undecided, and then nine days after its decision West Virginia sent a fully empowered Commission to the State of Virginia to ascertain, negotiate, and settle this debt. She, however, was rebuffed, and in the same year Virginia passed her funding acts, wherein she arbitrarily declared she owed only two-thirds of the debt and West Virginia owed the other third, and from that time on she never empowered a single one of her Commissions to treat with any West Virginia Commission upon any other basis. This meant that all negotiations were necessarily closed through the arbitrary conduct of Virginia, and the matter remained in this way until the present suit was instituted. Under such circumstances why should West Virginia be compelled to pay interest? She did not promise to do so, she was not in default, and interest should not be collected from her as damages and by way of punishment.

Another thought occurs upon the subject of interest, and it is this: when one promises to pay an equitable proportion of a debt as of a certain date, the equities by which the proper proportion of the debt is to be determined must be equities existing at that time, that is to say in this case, January 1, 1861, and cannot be determined by such equities as may have arisen or exist in the year 1915. So-called equities arising more than half a century after the contract was made were not contemplated by the parties. They did not have them in mind, and when they set up a standard of equity for the apportionment of the debt, the equities in contemplation of the parties must have been the surrounding circum-

stances at the time. In other words, had the contracting parties sat down on January 1, 1861, to ascertain West Virginia's equitable proportion of the then public debt of Virginia, they could not have looked forward and added into and made a part of that debt the interest that had not then been earned. Unearned interest was not a part of the debt. Neither could they, in the year 1915, sit down and look back and embrace as a part of the debt existing prior to January 1, 1861, the interest that had accrued after that time. In other words, this interest could not get into the debt either by anticipation or by retrospection.

There seems to be in this contract no express promise to pay interest and it is well settled that a sovereign State may not be charged with interest in the absence of an express promise to pay the same made either by the legislature or by its public officials thereunto lawfully authorized.

It is likewise well settled that interest cannot be charged either by virtue of a promise or as damages upon an amount that is unliquidated, the simple reason for such a rule being that you cannot ascertain six per cent or five per cent, or three, of any sum, unless you know what that sum is. You do not know what interest to pay because you do not know the amount of principal upon which it is to be paid. Two per cent of an unknown quantity would mean nothing and so would five, or six, or any other rate.

The principal here was absolutely unliquidated. Nothing could have been more so. It could not be arrived at by mere mathematical calculation, because the promise was not to pay one-fourth, one-fifth, or one-third of a definite amount, or any specific fractional part. It was to assume an equitable proportion of the public debt, whatever that might be, and the very use of the word "equitable" showed that evidence had to be taken, investigation made, and judgment given before the sum to be paid could be ascertained.

The strict law, therefore, would seem to be against the contention made by Virginia that West Virginia should be

charged with interest, and we find the equities strengthening this conclusion. The public debt of Virginia was created in the construction of railroads and canals, all of which were located within the limits of Virginia and she has them yet. When West Virginia was cut off she received none of these public improvements, but they were all left behind. Now after she has paid, we will say, toward the construction of these roads 23½ per cent of their cost and her territory has been cut off, taking with it none of these improvements, but leaving them all behind within the limits of Virginia, has she not done enough without paying interest beside? If she pays 23½ per cent of the principal of the debt that was created in the construction of these roads, none of which she gets, has she not performed her part without adding thereto the penalty of a half century's interest? She has not received by way of consideration for her contribution to the principal of this debt one cent. She has no public buildings constructed out of the proceeds of these bonds; she has no canals built therefrom; she has no railroads paid for out of their proceeds. These are all within the present limits of the State of Virginia. Virginia gets all the public improvements and West Virginia pays 23½ per cent of their cost. Why should she pay interest in addition? What consideration has West Virginia received for the 23½ per cent of the debt she will have to pay? And if she has received no consideration for that where would be the consideration for the interest that she now might be compelled to pay upon that 23½ per cent? Would it be equitable under such circumstances to pay interest?

Let us illustrate this situation further: Suppose two landowners undertake to jointly improve a tract of land owned by them and situate in the suburbs of some growing city. They conclude to first improve the eastern side of their joint property and borrow a hundred thousand dollars for that purpose. The whole of the money thus secured is expended upon the eastern half in the construction of sewers, the pavement of streets, the laying of sidewalks, and in such betterments and

improvements as ordinarily go with city property. After the whole fund has been exhausted they tire of their joint ownership and one concludes to withdraw in consequence of the fact, perhaps, that the other desires to create and place upon the property a still greater debt, and he takes a deed for the unimproved western half, relinquishing all interest in the eastern portion of the property. And at the time he retires from the enterprise he agrees to pay to his former associate an "equitable" proportion of the debt that had been created for the purpose of improving the property in which he no longer has any interest. What, under the circumstances, would be the equities between the two parties? Is there any equity that would compel the owner of the western half to contribute to the payment of the old debt? On the contrary, would not the equities point rather to the payment by the owner of the eastern half to the retiring partner a sum sufficient to indemnify the latter to the extent of the moneys expended by him upon improvements by which he has not and never can benefit in the least? This illustration relates simply to the principal of the debt, and nothing but the established promise, even according to the strictest rules of law, would hold the retiring owner to the payment of the promised part of the debt. Equity would not raise an obligation against him to that end under the circumstances, and if by virtue of the strict rule of law alone he could be compelled to pay a part of the principal, equity, where he had been silent upon the subject of interest, would certainly not compel him to also pay interest and go thereby beyond the strict terms of his foolish and unreasonable contract.

The situation is not met by giving West Virginia merely 23½ per cent of the value of the stocks and bonds that were purchased in the creation of this debt, because this would be settling with her upon the investment side of the proposition alone. All the indirect values, advantages, and benefits that flowed from the construction of these works of internal improvement were confined to Virginia, and they were worth more to Virginia than the mere investment. The construc-

tion of the railroads and canals increased her population, developed her territory, opened up her markets, and increased taxable values within her limits. The sitaution may be illustrated by the construction of a railway through a wilderness. Before its construction the lands would be cheap. There would be no transportation for its forest or farm products or for the wealth of its mines in the event minerals were found. After its construction mills would spring up, towns and villages and factories, its population would grow, its wealth increase, and the State of which it was a part would benefit almost beyond measure, although it might not own a single share of stock in the company that built it.

The map filed as an exhibit in this cause, and found between pages 282 and 285 of Vol. II of the new record, presents a perfect picture of conditions in the two States at the time of their separation. Virginia was penetrated in every direction by railways and her great canal traversed the State from the mountains to the sea. West Virginia, across the mountains, had no canals or public buildings and only seventeen miles of railway. Her territory was a blank and had yet to be developed at her own expense and unaided by Virginia or any one else.

Under such circumstances, after West Virginia has donated to the State of Virginia an amount equal to 23½ per cent of the principal of Virginia's debt, why should she be compelled to pay interest on her own donation? The fact that the debt was an interest-bearing one cannot, by implication or otherwise, stretch the rules of equity to such an unheard-of limit.

Respectfully submitted,

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April 26, 1915.